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Supreme Court of the United States

October Term, 1940.

No. 1071

AMERICAN-WEST AFRICAN LINE, INC.,
(Defendant-Appellant below)
Petitioner,

—against—

JOHN A. LYDECKER, Executor of the Estate of JOHN BERNARD FRYE, deceased,
(Plaintiff-Respondent below)
Respondent.

Petition for Writ of Certiorari to the Supreme Court of New York, New York County and Brief in Support Thereof.

GEO. WHITEFIELD BETTS, JR.,
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Counsel for Petitioner.

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(Defendant-Appellant below)
Petitioner,

—against—

JOHN A. LYDECKER, Executor of the Estate of JOHN BERNARD FRYE, deceased,
(Plaintiff-Respondent below)
Respondent.

Petition for Writ of Certiorari to the Supreme Court of New York, New York County.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, American-West African Line, Inc., respectfully shows to this Honorable Court as follows:

1. Summary and Statement of the Matter Involved.

This is a petition for certiorari brought to obtain a review of a judgment of the Supreme Court of the State of New York, County of New York, entered on the 10th day of January, 1941 affirming a judgment entered on a jury verdict for respondent. The

Court of Appeals in its discretion refused to review the judgment and an order was duly entered to that effect on the 21st day of March, 1941.

The action was brought under Section 33 of the Merchant Marine Act, known as the Jones Act (Title 46, Section 688, U. S. C. A.) on behalf of a dependent niece to recover damages for the death of John Bernard Frye, Chief Officer of petitioner's S. S. *Padnsay* (R., p. 9). The testimony was uncontradicted that Frye was commanding officer in charge of the vessel (the captain being ashore) (R., p. 231) and personally directing and issuing orders for the unloading of the No. 2 hatch at Port Harcourt, West Africa, at the time of the accident (February 6th, 1937). The accident occurred when the jumbo boom, which was being operated under Frye's personal supervision and orders fell at about 9 A. M. and the heel of it crushed him against the No. 1 starboard winch and he died three hours later (Defendant's Exhibit 1).

The evidence was uncontradicted that deceased was directly responsible to petitioner to keep the booms, winches and gear in good condition (R., pp. 187, 188; 236). Even if it is assumed that the conflicting and contradictory testimony of respondent's witnesses, by which respondent tried to prove that the heel of the boom, the winches and gear were defective, is true the complaint should have been dismissed because the evidence was uncontradicted that the duty of keeping such apparatus in repair rested solely on deceased and he failed to fulfill his duty (R., pp. 187, 188; 236). Even one of respondent's witnesses substantiated this (R., p. 126). Before he died, deceased admitted the accident was his fault (R., pp. 191, 249, 262, 396).

Upon the trial, at the close of respondent's case, a motion was made to dismiss the complaint for lack of proof and the court reserved decision on this motion (R., p. 164).

At the close of the entire case this motion was renewed and denied (R., p. 337) and another motion made to dismiss the complaint for lack of proof on all the evidence was denied (R., p. 338).

Petitioner's motion to set aside the verdict was conditionally granted unless the respondent would consent to a reduction of the verdict from $15,000 to $11,500, which he did (R. pp. 23, 24), and the motion to dismiss the complaint for lack of proof after the verdict was denied with an opinion (R., p. 416).

Under Sections 445-446 of the New York Civil Practice Act exceptions to the denial of these motions are deemed taken, nevertheless appropriate exceptions were taken on the trial (R., pp. 164, 338). The trial court's denial of these motions to dismiss the complaint squarely raised the question of the sufficiency of respondent's proof as a matter of law.

Upon appeal it was contended by petitioner that the denial by the trial court of these motions constituted reversible error. It was further urged that the complaint should have been dismissed because the respondent did not allege or prove that the deceased's parents did not survive him as required under Sections 51 and 59, Title 45, United States Code Annotated, which is incorporated in the Jones Act; that the uncontradicted and corroborated evidence conclusively established that the conditions which caused the accident were created solely and proximately by the deceased, which under decisions of this Court barred recovery; and that the verdict was induced by prejudicial questions and summation

which constituted reversible error under the decisions of the courts of the State of New York.

The Appellate Division of the Supreme Court, First Department, affirmed the judgment without an opinion (R., pp. 421, 422) and denied petitioner's motion for leave to appeal to the Court of Appeals (R., pp. 428, 429).

The Court of Appeals in its discretion denied a motion for leave to appeal to that court (R., p. 436).

2. Jurisdiction.

(a) The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13th, 1925, Chapter 229, Sec. 1, 43 Stat. 938 [U. S. C. A. Title 28, Section 347(a)].

(b) The date of the judgment to be reviewed is January 10th, 1941 (R., pp. 422, 423). The order denying petitioner leave to appeal to the Court of Appeals of the State of New York by that Court was entered on March 21st, 1941 (R., pp. 437, 438).

(c) The questions here presented involve the construction of the Railway Employers Liability Act (Secs. 51 and 59, Title 45, U. S. C. A.), the error of the trial court in failing to dismiss the complaint for lack of proof, and improper questions and summation on behalf of respondent.

(d) Cases believed to sustain the jurisdiction of this Court to grant a writ of certiorari in the present case are:

Chicago G. W. R. Co. v. *Rambo,* 298 U. S. 99;
Atchison Etc. Ry. v. *Saxon,* 284 U. S. 458;

Chicago M. & St. P. Ry. v. *Coogan,* 271 U. S. 472;
St. Louis v. *Simpson,* 286 U. S. 346;
Baltimore & Carolina Line Inc. v. *Redman,* 295 U. S. 654.

3. Questions Sought to be Reviewed Here and the Reasons Why the Writ Should be Granted.

The principal question presented on the present application is as follows:

> May a judgment entered on a jury verdict for damages for death in favor of a dependent niece under Sections 51 and 59 of Title 45 of the United States Code Annotated, which is incorporated by reference in the Jones Act, be permitted to stand where the trial court denied motions to dismiss the complaint for lack of proof after plaintiff's case, after the entire case and after the verdict in the absence of allegations or proof that the deceased left no parents surviving him?

The judgment is contrary to the decisions of this Court which hold that the last named beneficiary under the statute can only recover upon proof of the absence of the prior classes of beneficiaries. The rulings on the motions to dismiss the complaint were contrary to the law established in the cases of *New Orleans & N. E. R. R. Co.* v. *Harris,* 247 U. S. 367; *Beebe* v. *Mormack Gulf Lines,* 59 F. (2d) 319, cert. den. 287 U. S. 597; *Sabine Towing Co.* v. *Brennan,* 85 F. (2d) 478, cert. den. 293 U. S. 611.

In addition petitioner presents on this application the question of whether a recovery for respondent can be sustained where the uncontradicted and cor-

roborated evidence established that the accident was solely and proximately caused by the deceased. Petitioner was entitled to a peremptory instruction dismissing the complaint on the authority of *St. Louis* v. *Simpson,* 286 U. S. 346 and *De Luca* v. *Shepard Steamship Lines,* 65 F. (2d) 566; opinion modified, 67 F. (2d) 437, cert. den. 291 U. S. 685.

Petitioner also brings up for review the reversible error of the trial court in failing to grant a motion for a mistrial because of a prejudicial question asked on behalf of respondent; the decision of the trial court being contrary to the law of the State of New York as expressed in *Baesens* v. *New York Central Railroad Co.,* 201 App. Div. 191; *Bagully* v. *Morning Journal Association,* 38 App. Div. 522; *Lawson* v. *Nyman,* 258 App. Div. 1032; *People* v. *Johnson,* 284 N. Y. 182. Improper summation also prejudiced the jury.

The writ of certiorari should be granted because the judgment is patently contrary to the Federal Statutes and the applicable decisions of this Court and the questions involved are of substantial importance for the proper administration of justice.

WHEREFORE, your petitioner respectfully requests that a writ of certiorari issue out of and under the seal of this Honorable Court directed to the Supreme Court of the State of New York, County of New York, commanding said court to certify and send to this Court on a day to be designated, for its review and determination a full and complete transcript of the record of all proceedings in the said Supreme Court of the State of New York, County of New York, had in the within action entitled in that court

John A. Lydecker, Administrator of the Estate of John Bernard Frye, deceased, plaintiff-respondent, against *American-West African Line, Inc., defendant-appellant;* that the judgment of affirmance made and entered in said cause on the 10th day of January, 1941, may be reversed by this Honorable Court and the complaint dismissed and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

Dated, New York, N. Y., May 16, 1941.

AMERICAN-WEST AFRICAN LINE, INC.,
Petitioner.

By Geo. Whitefield Betts, Jr.,
Counsel for Petitioner.